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In the Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF NEBRASKA, PLAINTIFF

v.

STATE OF WYOMING, ET AL.

ON MOTION TO AMEND PETITION FOR AN ORDER ENFORCING DECREE AND FOR INJUNCTIVE RELIEF

MEMORANDUM FOR THE UNITED STATES

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MEMORANDUM FOR THE UNITED STATES

On October 7, 1986, Nebraska sought leave from this Court to file a petition for an order enforcing this Court's decree in *Nebraska* v. *Wyoming*, 325 U.S. 589 (1945), which established an interstate apportionment of the flow of the North Platte River. This Court granted Nebraska leave to file the petition on January 20, 1987, and instructed the parties to file answers. On June 22, 1987, the Court referred the case to a Special Master. Nebraska now requests this Court's leave to amend its petition to seek additional relief, including modification of the existing decree. Nebraska's motion, if granted, would greatly expand the scope, character, and complexity of this suit. The United States therefore suggests that Nebraska's motion be referred to the Special Master for his recommendation.

1. This Court's decision in *Nebraska* v. *Wyoming*, *supra*, resulted in the formulation of a decree apportioning the waters of the North Platte River among the States

of Nebraska, Wyoming, and Colorado.[1] Nebraska's 1986 petition contended that "Wyoming is presently violating and threatens to violate the State of Nebraska's equitable apportionment established in the Decree" (1986 Pet. para. 3). Nebraska specifically alleged that Wyoming was unlawfully restricting the flow of the North Platte River by its operation of the Greyrocks Reservoir on the Laramie River; by its proposed construction of additional river pumping, diversion and storage facilities at the confluence of the Laramie and North Platte rivers; by its proposed construction of storage capacity on certain tributaries entering the North Platte River; and by its attempts to "prevent the United States Bureau of Reclamation's continued diversion of North Platte waters in Wyoming through the Interstate Canal for storage in the Inland Lakes in Nebraska for the benefit of water users in the State of Nebraska" (*ibid.*). The 1986 petition did not specify the water uses in Nebraska adversely affected by the alleged violations; it merely stated that "Wyoming's violations are causing and will cause irreparable injury to the State of Nebraska and its citizens" (*id.* para. 6).

Nebraska's proposed amended petition repeats the allegations that Wyoming is unlawfully restricting the North Platte's flow. See Amended Pet. paras. 3-6. The amended petition contends, in addition, that the existing decree should be construed or modified to recognize an obligation to maintain stream flows necessary for critical wildlife habitat along the Platte River and to apportion this obligation among the States of Colorado, Wyoming, and Nebraska. See *id.* paras. 4, 7-8. The petition alleges that the 1945 decree established a regimen of stream flows

[1] The original decree is set forth at 325 U.S. 665-672. The decree has since been modified and supplemented upon joint request of the parties. See 345 U.S. 981 (1953).

for uses "consistent with the irrigation apportionment and which were necessary to maintain and preserve critical wildlife habitat along the North Platte and Platte Rivers in Nebraska" (*id.* para. 4). The amended petition also contends that Wyoming's "current and imminent actions" will "interfere with existing water uses in Nebraska for irrigation and for maintenance of critical wildlife habitat and thereby disturb and violate the equitable balance * * * established by the Decree" (*id.* para. 6).

As a practical matter, Nebraska's proposed amended petition seeks to restrain Wyoming, Colorado, and the United States from taking actions that would, in Nebraska's opinion, reduce stream flows necessary for either irrigation or wildlife purposes. Nebraska specifically seeks to restrict Colorado's and Wyoming's authority to approve new water appropriations on the North Platte to the extent they would "reduce the amount of water historically used in Nebraska for irrigation purposes and to maintain and preserve critical wildlife habitat," and seeks to restrict the authority of these states and the United States to approve construction of new projects and operate existing projects that would similarly diminish flows (*id.* paras. 7, 8).

2. Nebraska's motion to amend its petition, if granted, would greatly expand the scope, character, and complexity of the present suit. The original petition purported to seek enforcement of an existing decree. The amended petition would reopen the existing apportionment of the North Platte's waters to adjust the "delicate balance of the river" (*Nebraska* v. *Wyoming*, 325 U.S. at 625). This Court has, of course, undoubted power to provide such relief in appropriate circumstances; indeed, the Court expressly retained jurisdiction "for the purpose of any order, direction, or modification of the decree, or any other supplementary decree, that may at any time be deemed proper

in relation to the subject matter in controversy" (*id.* at 671). But the Court should exercise that power cautiously in light of the need for certainty and stability in the administration of water rights and in light of the legitimate expectation of the parties to the decree. Cf. *Arizona* v. *California*, 460 U.S. 605, 615-628 (1983).

Circumspection is particularly appropriate in this case because Nebraska's proposed amended petition raises novel and controversial issues that deserve careful consideration. For example, the proposed petition raises issues of first impression concerning the grounds upon which a state may seek modifications to an existing decree, the uses for which the waters of the North Platte River may be apportioned by decree, and the source of any water that would be made available for newly recognized uses. Furthermore, the legal theories underlying some of Nebraska's contentions, such as its allegations that Wyoming is violating the existing decree by actions on the Laramie River "inconsistent with the * * * provisions of the Endangered Species Act" (Amended Pet. para. 5A), are far from clear. Finally, the proposed amended petition may raise federal sovereign immunity issues by, for example, seeking to restrict the United States' authority to approve the construction of new projects or the operation of existing projects that would reduce the flow of the North Platte River into Nebraska.

3. In sum, Nebraska's motion presents numerous issues of far-reaching consequence. We therefore submit that this Court should refer the motion to the Special Master for his consideration. This course of action will allow the parties to brief the issues in detail and will permit the Special Master to prepare a recommendation for this Court. The Special Master is presently considering motions, filed by the Basin Electric Power Cooperative, the Platte River Trust, the National Audubon Society, and the

Nebraska Public Power District, for leave to intervene. A further reference of Nebraska's motion will enable the Special Master to prepare a consolidated recommendation, addressing all of these motions, that will provide concrete direction on the proper parties and issues in this litigation.

Respectfully submitted.

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